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Jurisprudence and Labor

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JURISPRUDENCE AND LABOR*

I

"Progress comes [in law] *per saltum* by successive compromises between extremes, compromises often, if I may borrow Professor Cohen's phrase, between 'positivism and idealism.' " [1] It comes as a series of dots and dashes represented by cases, which when flashed upon the screen of legal history reveal a picture of change, in the projection of which the substitution is scarcely perceptible. "At times the new ethos does not mean that there has come into being a new conception of right and wrong. It may mean nothing more than a new impatience, a new restiveness, in the face of old abuses long recognized as wrong." [2]

In spite of the obvious truth contained in Mr. Justice Cardozo's convincing rationalization of most legal progress, the fact that since the rise of the species of philosophical jurisprudence called "sociological jurisprudence" was coincident with the growing recognition of trade unionism in the United States, it has been assumed too often that the rise of the first was the motivating factor in the development of the second. Little is it realized that, whereas sociological jurisprudence has for its end the preservation of the rights of society, the idea behind all collective bargaining is the betterment of the individual rights of the worker, and, therefore, the labor unions are ultimately a development of a natural law theory of jurisprudence, preferably designated by the more revealing phrase, "theo-philosophic jurisprudence." [3]

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1 CARDOZO, PARADOXES OF LEGAL SCIENCE 27.

2 CARDOZO, *op. cit. supra* note 1, at 25.

3 Roscoe Pound, the foremost present-day advocate of this sociological school of jurisprudence, speaks of the betterment of labor conditions as a result of the

Many jurists, educators, and lawyers writing in the jurisprudential field are in accord with Dean Pound's paradoxically individualistic stand that since the science of jurisprudence is so undeveloped in the United States its development is sufficient to provide work for each along his own line of thought irrespective of conflicts of opinion.[4] Many of these writers, therefore, are content to adopt a *laissez faire* policy leading to a production of writings along many paths without a single thought towards either their convergence or a correction of possibly misdirected steps. However, a Dantesque hatred of indifference, and a belief that constructive criticism is also essential to a healthy development of the science of jurisprudence in the United States, prompts this joust with a straw man, strangely resembling a sociological jurist, in the hope that a popular misconception of the accomplishment of the sociological school might be corrected.

II

That there has been a change in the economic philosophy concerning the worker in the last fifty years is only too evident. Even a cursory examination of the history of such economic thought through the preceding centuries discloses ample reason for the necessity of the recent development. Starting with Adam Smith (purely for pedantic reasons) the application of his doctrine of *laissez faire* to the labor contract is apparent. Thence through the time of the Physiocrats in which, as Turgot put it, "In every sort of occupation

changing philosophical attitude, *i. e.*, the socialization of law, in *Social Problems and the Courts*, 18 AMER. JOUR. OF SOC. (1912-13) 334-38.

[4] "But in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work. If the time and energy expended on polemics were devoted to that work, jurisprudence would be more abreast of its tasks." POUND, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. (1931) 697, 711.

Zechariah Chafee, Jr., quotes and echoes this attitude in an address delivered before the Indiana State Bar Association. CHAFEE, *Some New Ideas About Law*, 11 IND. L. J. 503, 523.

it must come to pass that the wages of the artisan are limited to that which is necessary to procure him his subsistence."

These ideas were accepted by Ricardo and Malthus and carried over into English thought. Even Bentham, an adamant reformer of the abuses in the serf class, was always a warm defender of unlimited competition, that sole element decisive of labor's share according to Ricardo, which share gravitated towards the subsistence level. This philosophy that unlimited competition was the ever-efficient determinent found support to a certain extent in the United States, particularly in the courts which were slow to allow the state by legislative action, or trade unions by collective bargaining and other methods, to change this individualistic rule.

A summary examination of the leading cases depicting this individualistic philosophy might be profitable here to show the zealous manner in which the courts protected that abstract concept of liberty of contract. One of the many cases which decided that since our Constitution was a solidification of a philosophy of individualism said in part that there were,

". . . rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." [5]

As has been intimated, the right most vigorously defended by the judiciary is the right to liberty of contract;[6] and although the case of *Butcher's Union, etc., Co. v. Crescent City, etc., Co.*,[7] decided in 1884, is referred to as the source of the doctrine of liberty of contract, the court really only called attention to a principle never denied.

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[5] Savings & Loan Association v. Topeka, 20 Wall. 655, 662 (1875).

[6] For a humorous *reductio ad absurdum* on the freedom of contract, see 25 NEW REPUBLIC (1921) 243.

[7] 111 U. S. 746 (1884).

A series of cases affirming the philosophy of the above case followed. Only the two most famous ones, however, will be referred to directly. Of great importance was the case of *Lochner v. New York*[8] which definitely affirmed the principle that,

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment to the Federal Constitution."

Straining the doctrine to the extreme was the case of *Adkins v. Children's Hospital*[9] in which the Supreme Court said:

"That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause [of the Fifth Amendment] is settled by the decisions of this court, and is no longer open to question."

Following the *Adkins* case the pendulum started its long awaited backward swing propelled to a great extent by the vigorous dissents of the greatest of all dissenters, the late Mr. Justice Holmes, ably assisted in later years by Mr. Justice Brandeis and other socially minded jurists. By them the way was prepared for a new application of old principles long ago forgotten in the Procrustean bed of legal precedent, and with the functioning of the International Labor Organization, and the inclusion of Section 7 (a) in the Codes under the N. I. R. A.[10] succeded by the National Labor Relations Act,[11] the broad highway of social justice for the laborer was once more entered upon.

III

One of the admitted reasons for the survival of the doctrine of unlimited competition in the United States is that originally the Federal Government was comparatively weak, and only when it grew strong did the school of sociological

8 198 U. S. 45 (1905).
9 261 U. S. 525, 545 (1923).
10 16 U. S. C. A. § 707a (1933).
11 29 U. S. C. A. §§ 151-166 (Supp. 1935).

jurisprudence grow proportionately. The well-known political scientist, Charles E. Merriam, in his work *American Political Ideas,*[12] succinctly traces the changes in thought within the past fifty years in these words:

"Broadly speaking three philosophies of action and interpretation were in competition during this time. They were the old time doctrine of conservatism, centering around the unimpeded operations of the assumed 'natural laws' of trade; the liberal or progressive theory demanding popular control of the most threatening features of the new industrialism in the interests of the many as against the few; and the collectivist philosophy demanding industrial democracy in the broadest sense of the term. Of these the first reigned without much opposition during the greater part of the time; the second rose to power as the middle of the period approached, and the third had no status until toward the middle of the period but gained in strength as the end of the period drew near . . . . The economic theory of the benevolence of competition was shattered by the sudden appearance of monopoly and unfair competition; the sociological theory of Spencer was matched by that of Ward, who urged the 'efficacy of effort' as a legitimate interpretation of the Darwinian theory. . . . 'The most stubborn case for the old principle was made against organized labor on the plea of freedom of contract, and the industrial liberty of the citizen, but even here, as has been shown, the tide turned, for the opposition was too great to conditions that could not be tolerated on either a democratic or human basis.' Nowhere was a tougher texture of legal and economic individualism encountered than in America, but for that very reason nowhere was the advance of a conscious social policy more marked and conspicuous and significant than here."

The old theory of "rugged individualism" gave way before a changing background under the weight of the truth that man by becoming a collectivist increases his security as an individual. Or as the Secretary of Agriculture might phrase it,[13] "those who wish more security must sacrifice some liberties."

IV

To appreciate more fully the present-day advanced treatment of the laborer it is necessary to delve somewhat into

12 Pp. 450-61.

13 See, WALLACE, THE NEW FRONTIERS. See, also, Miltner, *The Paradox of Law and Liberty,* 8 NOTRE DAME LAWY. 451, 457.

the long history of the workers' laborious struggle for social justice. Labor's struggle anomalously began when labor was strongest, for, the Statute of Laborers [14] is generally conceded to be the start of labor's fight for a fair share of the wealth produced by them. The Statute of Laborers was passed just after the Black Death had swept Great Britain, leaving its survivors in a commanding position as far as bargaining with a prospective employer was concerned. It provided for compulsory work at pre-Plague prices by all able bodied men, thus treating the laboring contract differently from all other contracts, by abolishing the right to bargain, individually at first, and later collectively, for, the philosophy of the Statute remained in the English law long after the emergency ceased.[15] In fact paradoxical as it may seem, this doctrine, an outgrowth of the then emergency of a scarcity of labor may be repealed only by the present emergency of a super-abundance of labor.

A question of vast importance remains unanswered. It is, Will the present emergency wipe out the effects of the policy of the law as to the worker which arose out of the emergency of the Black Death, by giving group bargaining instead of the individual bargaining power the laborer possessed then? The Plague's emergency created one philosophy. Has the Depression created another? Is the latter necessarily socialistic?

V

Assuming that labor's fight for social justice is centered around their demand for the right to bargain collectively, the nature of this right demanded must first be examined, and then that which the laborer seeks to attain through this

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14 25 EDW. III.

15 This retention of policy long after the reason for the same has ceased to exist finds an analogy in Chief Justice Hughes' decision in the *Minnesota Moratorium Case*, 290 U. S. 398 (1934), which he based in part on the *Washington Rent Case* which was originally predicated upon Congress' war powers, and not on a general emergency doctrine.

group action must be thoroughly considered in order to establish the thesis that the changing philosophy exemplified in the granting of collective bargaining to the laborer is a recognition of a theo-philosophic theory rather than socialistic alteration of our fundamental juristic thought. That labor has a natural law right to bargain collectively is seldom questioned, collective action being merely "machine methods" applied to "machine employers"; or, as the celebrated moralist and economist, Dr. John A. Ryan, has said,[16]

"As a determinant of rights economic force has no more validity or sacredness than physical force."

Once given the right to collective action, that which a laborer first seeks is a living wage; in fact, it may be accurately said that a living wage is all that a laborer seeks through the medium of collective action.[17]

Man's right to a living wage is an individual right, and not one that exists because he is a member of society. This proposition is conclusively established by Dr. Ryan in his work, *The Living Wage*, in which it is said:

"This right is personal, not merely social; that is to say, it belongs to the individual as individual, and not as a member of society; it is the laborer's personal prerogative, not his share of social good; and its primary end is the welfare of the laborer, not that of society. Again, it is a natural not a positive right; for it is born with the individual, derived from his rational nature, not conferred upon him by positive enactment. In brief the right to a living wage is individual, natural, and absolute." [18]

Dr. Ryan in going on to refute the doctrine that all rights are positive, that is, derived from society, and conferred upon the individual primarily for the benefit of society, and only secondarily for the benefit of the individual, says:

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16 RYAN, A LIVING WAGE 177.

17 This is explainable by the assumption that all things desired by the laborer, such as better working conditions, trade agreements and the like, can readily be translated into money, and the worker receives them either as a higher monetary wage, or, factually, in which latter instance their cost is deducted by the employer from the sum given the employee.

18 RYAN, *op. cit. supra* note 16, at 3.

"Society is not an organism in the sense that it is a finality. Its members do not exist and function for its welfare; they possess intrinsic worth and sacredness. Hence, it is not an organism in which the individual's personality is merged and lost, like the branch of a tree, to use the illustration of Hegel. . . . every right that society possesses, every act that it performs, every assertion that it makes of its legitimate power over individuals, is ultimately for the sake of individuals. It cannot otherwise be justified, for it is not an end in itself." [19]

His Holiness Pope Leo XIII also constantly stressed the fact that labor had an individual natural law right to a living wage, and in his famous *Encyclical Rerum Novarum* said:

"Let it be granted, then, that as a rule, workmen and employer should make free agreements, and in particular should freely agree as to wages; nevertheless there is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage earner in reasonable and frugal comfort. If through necessity or fear of a worse evil, the workman accepts harder conditions because an employer or contractor will give him no better, he is the victim of force and injustice." [20]

In support of this statement, the Holy Father, in the same section, offers in substance this explanation: Labor has two elements: First, it is personal; second, it is necessary, for "by the sweat of thy brow thou shalt eat bread." [21] If only the first element existed the proposition of freedom of contract would be all controlling; but as labor is also necessary for the preservation of human life, a living wage is mandatory, for, the poor can survive only by work and wages.

Once established that the reason behind all collective bargaining granted to the laborer under the modern judicial philosophy is a natural law right, it is easily discernible that the credit placed for the attainment of this benefit does not properly lie in its entirety with the rising school of sociological jurisprudence, but rather with a "natural law school," for, although group means are used to acquire a living wage, the philosophy behind the entire action is based on a natural

19 RYAN, *op. cit. supra* note 16, at 17.

20 ENCYCLICAL RERUM NOVARUM § 34 (May 15, 1891).

21 GENESIS iii., 1.

law right of the individual *qua* individual, and those improperly lauding the sociological school upon a superficial examination of a coincidence between a legal and factual phenomenon might profitably consider the observation of Mr. Justice Cardozo:

"At times the new ethos does not mean that there has come into being a new conception of right and wrong. It may mean nothing more than a new impatience, a new restiveness, in the face of old abuses long recognized as wrong." [22]

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22 CARDOZO, *op. cit. supra* note 1, at 25.